DOCKET FILE COPY ORIGINAL

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them	)	
	)	
and	)	**PR Docket No. 92-235**
	)	
Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services	)	

To: The Commission

JOINT OPPOSITION OF API, UTC AND AAR TO PETITIONS FOR PARTIAL RECONSIDERATION FILED BY MRFAC, INC. AND FIT

AMERICAN PETROLEUM INSTITUTE

By: Wayne V. Black
Nicole B. Donath
Keller and Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4100
Its Attorneys

UNITED TELECOM COUNCIL

By: Jeffrey L. Sheldon
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036
(202) 872-0030

ASSOCIATION OF AMERICAN RAILROADS

By: Thomas J. Keller
John M. Kneuer
Verner, Liipfert, Bernhard,
McPherson and Hand, Chtd.
901 15th Street, N.W., Suite 700
Washington, D.C. 20001
(202) 371-6060
Its Attorneys

Dated: September 30, 1999

TABLE OF CONTENTS

SUMMARY

The American Petroleum Institute ("API"), the United Telecom Council ("UTC") and the Association of American Railroads ("AAR") strongly urge the Commission to deny the Petitions for Partial Reconsideration filed by MRFAC, Inc. ("MRFAC") and Forest Industries Telecommunications ("FIT") with regard to certain coordination rules adopted by the Commission in its *Second Memorandum Opinion and Order* ("*Second MO&O*") in this proceeding. Based upon the extensive record that has been gathered in this long-standing matter -- including evidence of legitimate public safety concerns -- the Commission properly concluded in its *Second MO&O* that any channels formerly allocated on a shared basis to the Petroleum, Power or Railroad Radio Services should continue to be coordinated or subject to concurrence by the designated frequency coordinators for those services. This conclusion was a "logical outgrowth" of the Commission's prior proposals regarding service pool consolidation and, as such, did not run afoul of the Administrative Procedure Act.

Further, as a policy matter, MRFAC and FIT have not presented any concerns which warrant the eradication of the important safety-related protections adopted by the Commission. In short, there is absolutely no evidence that MRFAC, FIT and/or their frequency coordination customers will suffer any measurable harm as a result of the new rules. Instead, these rules appropriately balance the right and interests of all affected

parties. Accordingly, the Commission should reaffirm their validity and immediately lift the stay that has been imposed.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them	)	
	)	
and	)	**PR Docket No. 92-235**
	)	
Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services	)	

To: The Commission

JOINT OPPOSITION OF API, UTC AND AAR TO PETITIONS FOR PARTIAL RECONSIDERATION FILED BY MRFAC, INC. AND FIT

The American Petroleum Institute ("API"), the United Telecom Council ("UTC") and the Association of American Railroads ("AAR"), pursuant to Section 1.429(f) of the Rules and Regulations of the Federal Communications Commission ("Commission"), hereby respectfully submit this Joint Opposition to the Petitions for Partial Reconsideration of the Commission's *Second Memorandum Opinion and Order* ("*Second MO&O*")[1/] in this proceeding filed by MRFAC, Inc. ("MRFAC") and Forest Industries

---

[1/] *Second MO&O*, 64 Fed. Reg. 36258 (July 6, 1999).

Telecommunications ("FIT").[2/] For the reasons discussed herein, API, UTC and AAR urge the Commission to lift the Stay Order imposed on August 5, 1999[3/] and to reaffirm the propriety and utility of its rules that were adopted in the *Second MO&O* to provide certain needed coordination protections to licensees in the former Petroleum, Power and Railroad Radio Services.

I. INTRODUCTION AND BACKGROUND

1. API is a national trade association representing approximately 350 companies involved in all phases of the petroleum and natural gas industries, including exploration, production, refining, marketing, and transportation of petroleum, petroleum products and natural gas. Among its many activities, API acts on behalf of its members as spokesperson before federal and state regulatory agencies. The API Telecommunications Committee is one of the standing committees of the organization's Information Systems Committee. One of the Telecommunications Committee's primary functions is to evaluate and develop responses to state and federal proposals affecting telecommunications services and facilities used in the oil and gas industries. Consistent with that mission, it also reviews and comments, where appropriate, on other proposals

---

[2/] Petitions for Reconsideration of *Second MO&O*, 64 Fed. Reg. 50090 (Sept. 15, 1999) (corrected Federal Register notice).

[3/] See *Fourth Memorandum Opinion and Order*, PR Docket No. 92-235, FCC 99-203 (Aug. 5, 1999).

that impinge on the ability of the energy industries to meet their telecommunications needs. API's Petroleum Frequency Coordinating Committee ("PFCC") is the FCC-certified coordinator for petroleum channels.[4/]

2. UTC is the national representative on communications matters for the nation's electric, gas, water and steam utilities, and natural gas pipelines. UTC's approximately 1,000 members range in size from large combination electric-gas-water utilities which serve millions of customers, to smaller, rural electric cooperatives and water districts which serve only a few thousand customers each. UTC's members provide electric, gas, and water service to the majority of United States households and businesses and operate in all fifty (50) states and the District of Columbia. UTC also serves as an authorized frequency advisory committee in the Industrial/Business Pool below 512 MHz.

3. AAR is a voluntary, non-profit organization composed of Class I and other railroad companies operating in the United States, Canada and Mexico. These railroad companies generate 97% of the total operating revenues of all railroads in the United States. AAR represents its member railroads in connection with Federal regulatory matters of common concern to the industry as a whole, including matters pertaining to the regulation of communications. In addition, AAR functions as a frequency coordinator

---

[4/] See Frequency Coordination in the Private Land Mobile Radio Services, *Report & Order*, PR Docket No. 83-737, 103 FCC 2d 1093 (Apr. 15, 1986), at ¶ 81.

with respect to the operation of land mobile and other radio-based services. The railroads use land mobile radio frequencies for critical safety and operational functions to support nationwide railroad operations, to control train movements and to monitor safety-related conditions of track and equipment throughout the railroad system.

4. API, UTC and AAR have been active participants in the Commission's efforts to introduce greater efficiency in the private land mobile radio ("PLMR") bands below 512 MHz and have filed numerous comments and other pleadings, both jointly and separately, to encourage efficiency while protecting the important communications systems of the nation's critical infrastructure industries ("CII"). In its *Second Report and Order* ("*Second R&O*") in this proceeding, the Commission recognized that these industries provide "critical, public safety-related communications"[5/] and that "[a]ny failure in their ability to communicate by radio could have severe consequences on the public welfare."[6/] Accordingly, the Commission adopted rules which provide for coordination by API, UTC and AAR for channels that, prior to pool consolidation, had been allocated for exclusive access by Petroleum, Power and Railroad licensees, respectively. Although pleased with this measure of protection for former exclusive channels, API filed a Petition for Reconsideration of the *Second R&O* which proposed certain coordination protections for all channels formerly allocated to the Petroleum

---

[5/] *Second R&O*, 12 FCC Rcd 14307, 14309 (1997).

[6/] *Id.* at 14329.

Radio Service, whether on a shared or an exclusive basis.[7/] In June 1998 (while API's Petition for Reconsideration was still pending), API and UTC jointly filed an Emergency Request for Limited Licensing Freeze ("Emergency Request") which sought temporary relief to interference problems that had been occurring as a result of the coordination of new business radio systems on channels that previously were shared by Petroleum or Power licensees with only a few other radio services. Soon thereafter, API, UTC and AAR filed a joint Petition for Rule Making which requested more permanent relief to these problems through the creation of a new "Public Service" pool in the "refarmed" spectrum bands.

5. In its *Second MO&O*, the Commission acknowledged that "a legitimate safety issue" had been raised regarding the frequencies that were assigned to the former Petroleum, Power and Railroad Radio Services on a shared basis prior to service pool consolidation.[8/] As a result, the Commission determined that these frequencies must be coordinated by the coordinator for that service unless that coordinator provides prior written concurrence to their coordination by another certified frequency coordinator for the Industrial/Business pool.[9/] These important new coordination procedures have yet to take effect, however, due to the Commission's grant of Motions for Partial Stay that were

---

[7/] See further discussion below of API's Petition for Reconsideration.

[8/] *Second MO&O* at ¶ 9.

[9/] *Id.*

filed by MRFAC and FIT.[10/] These parties subsequently filed Petitions for Partial Reconsideration ("Petitions") which seek to permanently eradicate the necessary coordination protections for CII licensees which were adopted in the *Second MO&O*.

II. OPPOSITION

6. In their Petitions, MRFAC and FIT principally make the following arguments in support of their efforts to jettison the new coordination requirements that were adopted in the *Second MO&O* in order to address "a legitimate safety issue": (1) the new rules were adopted without proper notice and an opportunity for public comment in violation of the Administrative Procedure Act; and (2) the new rules are arbitrary and capricious in that MRFAC and FIT have successfully coordinated the frequencies at issue for many years, and they and the industries they serve are likely to suffer substantial harm as a result of the Commission's action. As shown below, neither of these arguments has any merit.

A. The New Coordination Rules Adopted in the *Second MO&O* Comply With the Administrative Procedure Act

7. MRFAC and FIT argue that the rule revisions in the *Second MO&O* were adopted in violation of Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553

[10/] In fact, the Commission went beyond the relief requested by MRFAC and FIT and stayed the new coordination procedures in their entirety (*i.e.*, as applied not only to the frequencies typically coordinated by MRFAC and FIT, but as to *all* formerly shared frequencies).

("APA"), because the agency did not give notice nor afford a reasonable opportunity for MRFAC, FIT and other interested parties to submit comments on that amendment.[11/] They argue that the revisions to Section 90.35(b), adopted in the *Second MO&O*, were not interpretative, procedural or a statement of general policy, and that the amendment to that Rule section is the type of rulemaking to which the prior notice and comment requirements of the APA apply. They further argue that the amendment was not within the scope of any of the proposals in the record on which the Commission's decision was based, was not proposed in any petitions for reconsideration, nor in any of the comments on those petitions. These arguments are unpersuasive for a number of reasons.

8. First, MRFAC and FIT are apparently of the opinion that an agency may never substantially revise a rule on reconsideration without soliciting additional comment through a further notice of proposed rulemaking. However, their assumption is patently incorrect. In AT&T Corp. v. FCC, 113 F.3d 225 (D.C. Cir. 1997), the court rejected the argument that an agency may not modify a rule following its adoption in an initial Report and Order:

> Under the FCC's rules, a petition for reconsideration may be filed within 30 days of a final agency order, 47 U.S.C. § 405(a), and insofar as such petitions are timely filed, the rulemaking is not final pending their resolution. The *Third Order on Reconsideration* is thus properly viewed as a further step in the ongoing BNA rulemaking, rather than a commencement of a new rulemaking proceeding. It follows that in reviewing the instant challenge to the adequacy of the agency's

---

[11/] FIT Petition at 5-6; MRFAC Petition at 2 n.2, incorporating by reference the arguments set forth in its July 7, 1999 *Motion for Expedited Partial Stay* ("*Motion*").

> justification for its interpretation of its regulation, the court must consider the entire rulemaking record from the commencement of the proceeding. AT&T offers no support for its contrary view, implicit in its argument that the FCC's construction of its rule is contrary to agency precedent, that in an ongoing rulemaking the agency must restate its previously expressed rationale in each subsequent order. Consequently, because there was a continuing rulemaking, the FCC was free to modify its rule on a petition for reconsideration as long as the modification was a 'logical outgrowth' of the earlier version of the rule, and provided the agency gave a reasoned explanation for its decision that is supported by the record. Under the arbitrary and capricious standard, the scope of our review is narrow, and a court may not 'substitute its judgment for that of the agency.'[12/]

The Court went on to explain that, although the discussion of an agency's action in a reconsideration order might be terse, "the agency's statements must be read in light of its discussion [in the original orders] . . . which form part of the administrative rulemaking record."[13/]

9. The present rulemaking is indistinguishable. Throughout this proceeding, the FCC has broadly inquired into the appropriate level of consolidation and other proposals that might satisfy the goals established by the FCC to protect existing users while maximizing the benefits of PLMR spectrum. In the original *Notice of Proposed Rulemaking* ("*NPRM*"), the FCC offered two alternatives for pool consolidation, but also specifically requested comment on "any other alternatives that will fulfill the goals and

---

[12/] 113 F.3d at 229 (internal citations omitted).

[13/] 133 F.3d at 230.

objectives of this proceeding."[14/] In the *First Report and Order and Further Notice of Proposed Rulemaking*, the FCC declined to adopt specific rules for pool consolidation, noting that no consensus among the PLMR community had been reached. Instead, the FCC sought further comment on a pool consolidation proposal "representative of the interests and needs of the PLMR community and frequency coordinators."[15/] The FCC also indicated that its investigation of pool consolidation was not limited to its initial two proposals, stating that the plan for consolidation outlined in the *NPRM* provides an initial "guideline" for consolidation, and recognized the need to consider "the importance of different services."[16/]

10. In the *Second R&O*, the FCC adopted a pool consolidation plan that included special protection for the "quasi-public safety" utility, petroleum and railroad industries. The Commission acknowledged that these services are "critical, public safety related services" because users in these services "employ radio not just for day-to-day business needs but also to respond to emergencies that could be extremely dangerous to the general public."[17/] The FCC also recognized that "the nature of [these services'] day-to-day operations provides little or no margin for error and in emergencies they can take

---

[14/] *NPRM*, 7 FCC Rcd 8105, 8111 (1992).

[15/] *First Report and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 10076, 10106 (1995).

[16/] *Id.* at 10106.

[17/] *Second R&O* at ¶ 41.

on an almost quasi-public safety function."[18/] Furthermore, the FCC noted that "[a]ny failure in their ability to communicate by radio could have severe consequences on the public welfare."[19/] In light of these considerations, and based on evidence in the record, the Commission adopted rules which provide for coordination by UTC, API and AAR for channels that, prior to consolidation, had been allocated for exclusive use by Power (IW), Petroleum (IP) or Railroad (LR) licensees, respectively.

11. As MRFAC itself pointed out in its *Motion for Expedited Stay*, a final rule need not exactly match the rule proposed. The final rule must merely be a "logical outgrowth" of the proposed rule.[20/] In fact, "[a]n agency can even make substantial changes from the proposed version, as long as the final changes are 'in character with the original scheme' and a 'logical outgrowth' of the notice and comment."[21/] A final rule is

---

[18/] *Id.*

[19/] *Id.*

[20/] MRFAC *Motion* at 9-10.

[21/] Natural Resource Defense Council v. EPA, 824 F.2d 1258, 1283 (1st Cir. 1987). See also American Medical Association v. US, 887 F.2d 760 (7th Cir. 1989) ("That an agency changes its approach to the difficult problems it must address does not signify the failure of the administrative process. Instead, an agency's change of course, so long as generally consistent with the tenor of its original proposals indicates that the agency treats the notice-and-comment process seriously, and is willing to modify its position where the public's reaction persuades the agency that its initial regulatory suggestions were flawed.").

not a logical outgrowth of a proposed rule "when the changes are so major that the original notice did not adequately frame the subjects for discussion."[22/]

12. It is clear that the rule modifications adopted in the *Second MO&O* -- to provide additional coordination protections for the Power, Petroleum and Railroad Radio Services -- are a "logical outgrowth" of the Commission's proposals in this docket and the record evidence. As noted above, the FCC undertook a broad investigation of all issues pertaining to consolidation and requested comment on how best to meet the needs of PLMR users while allowing more efficient use of PLMR spectrum. Its decision in the *Second MO&O* to expand coordination protections to shared channels was definitely "in character" with the proposals made by the FCC regarding pool consolidation.

13. Moreover, the FCC's decision to permit general access to ALL Power, Petroleum and Railroad channels subject only to special coordination protections can be seen as a compromise between the FCC's proposal for a wholesale consolidation of PLMR services into only two pools and the comments of numerous parties calling for multiple pools, with little or no sharing of channels between the various pools.[23/] Clearly, the Commission would have acted within the scope of the rulemaking had it elected to create a separate pool for the Power, Petroleum and Railroad Radio Services; therefore,

---

[22/] Connecticut Light and Power Co. v. Nuclear Regulatory Commission, 673 F.2d 525, 533 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982).

[23/] *Second R&O* at ¶¶ 11-17 and Appendix B.

its proposal to allow general access to these same channels subject only to special coordination requirements is necessarily within the scope of the rulemaking.[24/]

14. Finally, the specific issue of expanding the existing coordination protection for critical radio systems was raised by API in its "Petition for Reconsideration" of the *Second R&O*. API raised serious public safety concerns with the FCC's decision to permit any FCC-authorized coordinator to coordinate systems on the shared channels. API also restated the FCC's findings that the Power, Petroleum and Railroad Radio Services are critical for responding to emergencies that could impact large numbers of people. While unstated by API, the FCC was correct in finding that the extension of the relief to other CII or quasi-public safety industries was a logical outgrowth of API's petition and thus provided MRAC, FIT and others with sufficient notice of the issue. In short, the FCC's extension of coordination protections to all channels allocated to these quasi-public safety radio services was a logical outgrowth of its original proposals, and did not require initiation of further notice-and-comment procedures.

[24/] See, e.g., Omnipoint v. FCC, 78 F.3d 620 (D.C. Cir. 1996) (modification of a rule was within the scope of the rulemaking where the NPRM proposed to eliminate the rule and some commenters argued that the rule be retained).

B. The New Coordination Procedures are Necessary to Protect Public Safety and Will Not Cause Substantial Harm to Other Parties

15. Throughout this proceeding, the Commission has recognized the "quasi public safety" nature of the radio systems operated by the petroleum, power and railroad industries.[25/] There is substantial evidence as to the danger that is being posed by the current lack of coordination protection for the shared channels that are utilized by these industries. The following are just a few examples of the types of problems that already have occurred due to inadequate coordinations conducted by non-CII coordinators:

- In July 1998, Shell Communications, Inc. ("Shell") began to experience interference to its hand-held units used to coordinate the unloading of petroleum from ship to shore in Tampa, Florida. Because much of Florida's petroleum must be imported by barges, there is a significant movement of petroleum in Florida port cities. Consequently, with the increased traffic comes a greater potential for environmental- and life-threatening accidents if reliable communications are not available. The source of interference to Shell's system was identified as an automobile towing company newly coordinated on the same channel pair. Apparently, because the towing company -- located just 8 miles away -- was not monitoring the channel before using the system and because of heavy use by the towing company, the channel was rendered useless to Shell.

- For several months in 1998, Public Service Electric and Gas ("PSE&G"), a gas utility in New Jersey, was prevented from using its radio dispatch system to maintain communications with its emergency and maintenance crews when another coordinator coordinated a new private carrier communications system on a frequency co-channel to the existing PSE&G radio system, about twenty-five (25) miles distant and at significantly greater power than PSE&G's system. Because of this inherently defective coordination, there were at least sixteen (16) documented instances where PSE&G crews did not receive dispatch orders relating to instructions from local public safety officials for the immediate disconnection of gas service (e.g., to scenes of fires). The interfering system ultimately was ordered to

---

[25/] See, e.g., *Second R&O*, at 14329.

cease operations, but just recently, another licensee began causing interference to PSE&G's gas dispatch operations. Apparently, the licensee had amended its application at the last minute to change its proposed frequency, and no notice was provided to UTC or any other coordinator. It was only with the use of direction-finding procedures that PSE&G could locate the source of the interference in order to request that the license be revoked.

- EUA Service Corporation ("EUA"), headquartered in West Bridgewater, Massachusetts and a subsidiary of Eastern Utility Associates, experienced interference from two additional licensees on the same channel EUA uses for switching operations and transmission line restoration. These two users, a realty company and a tour company, were licensed directly across Boston Harbor and within 20 miles from the utility's nearest repeater.

- Kansas City Power & Light Company ("KCPL") is a regional electric utility serving customers in the Kansas City metropolitan area and surrounding 23 counties of western Missouri and eastern Kansas. In August 1998, a for-profit property management company's radio system was licensed on a frequency pair that had been licensed for over 18 years by KCPL. This new radio system had overlapping radio coverage with KCPL and was located approximately 20 miles from KCPL's radio system. For 10 days, critical KCPL radio calls were disrupted, and radio operations severely compromised, because of harmful interference from the property management company's mobile radios.

- Florida Power and Light ("FP&L") has recently noted interference on the frequency it uses for a land mobile repeater operation. The new licensee was coordinated on the exact same channel for a repeater operation and 35 mobile units only 12 miles away from FP&L's operations.

16. The new procedures adopted in the *Second MO&O* provide a reasonable means of averting further interference problems of this nature. The designated coordinators for the petroleum, power and railroad industries have the greatest incentive to ensure that new systems are not coordinated in a manner that will threaten the integrity of the vital communications systems used by CII entities. Further, these coordinators

have the most extensive knowledge of the industries that they serve and the manner in which these industries employ their communications systems. As such, and in light of the potential risk to public safety that is involved, it is only appropriate that these coordinators be provided the opportunity to coordinate or provide prior concurrence on any application that may impinge incumbent CII operations.

17. While API, UTC and AAR agree with MRFAC and FIT that coordination traditionally has been successful between the small number of generally compatible users in the industries served by the foregoing organizations, it would not make any sense to except MRFAC and FIT from the new coordination/concurrence rule adopted by the Commission. To begin with, MRFAC and FIT -- despite the best intentions -- are not immune to the type of coordination errors that may result in unacceptable interference to CII systems. In fact, one petroleum licensee has reported that FIT recently approved the coordination of a new trunked radio system that poses a significant risk of interference to nearby petroleum operations on the same frequencies.[26/] Moreover, due to service pool consolidation, MRFAC and FIT now have the ability to coordinate applications by entities in industries other than manufacturing and forestry; thus, they may increasingly be confronted with coordination requests by applicants whose operations are not as compatible with CII operations as those of their historical customers. In any event, the Commission should not be expected to wait until serious problems with MRFAC and FIT

[26/] The petroleum licensee presently is attempting to resolve this problem with FIT.

coordinations have actually occurred (with potentially severe consequences to the public) before placing in effect a rule of general applicability that is meant to promote public safety.[27/]

18. Nor should the Commission abandon the much-needed coordination protections adopted in the *Second MO&O* on the sole basis of the unfounded and unsubstantiated claims by MRFAC and FIT that they and/or their customers will suffer substantial harm as a result of the new rules. First, there certainly is no evidence that the new procedures will negatively impact the coordination revenues earned by MRFAC and FIT. In this regard, it is important to note that the new rules allow MRFAC and FIT to continue to coordinate systems on the formerly shared channels so long as the concurrence of the appropriate frequency coordinator is obtained.[28/] API, UTC and AAR have no intent to require manufacturing and forestry customers to seek coordinations directly from them, and the coordinators for the CII are prepared to provide the requisite concurrence to MRFAC and FIT on any application for shared channels that does not pose an unacceptable risk of interference to CII operations. As further discussed below,

---

[27/] Indeed, Section 332(a) of the Communications Act, emphasizes that "[i]n taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with Section 1 of this Act, whether such actions will-- (1) promote the safety of life and property." 47 U.S.C. § 332(a). See, *e.g.*, Keller Communications, Inc. v. FCC, 130 F.3d 1073 (D.C. Cir. 1997) (FCC has been directed by Congress to protect public safety, so it is well within the agency's discretion to modify general policies in order to protect public safety uses of private land mobile spectrum).

[28/] *Second MO&O* at ¶¶ 9 and 28.

API, UTC and AAR also are amenable to working with MRFAC and FIT to develop mutually acceptable procedures to facilitate the concurrence process. Due to MRFAC and FIT's knowledge of their industries and the strength of their prior relationship with their existing customers, these customers most likely will desire to continue working with the coordinator that traditionally has served their industry, regardless of any additional administrative procedures that may be entailed.

19. Secondly, there is absolutely no reason to believe that the frequency coordination customers of MRFAC or FIT will be harmed in any way as a result of the new coordination procedures (except, of course, to the extent that they may be prevented from licensing systems that will cause unacceptable levels of interference to incumbent CII operations). As discussed above, these customers will continue to have the option of submitting their applications directly to MRFAC and FIT. Thus, contrary to MRFAC and FIT's assertions, the competitive coordination model has not been eradicated. Nor should customer confusion be an issue here; again, because MRFAC and FIT's customers simply may continue to submit all of their applications directly to MRFAC and FIT, it is the coordinators (not the customers) who would then bear the responsibility of determining whether any concurrence is needed from API, UTC or AAR.

20. Also flatly incorrect is FIT's contention that "[f]orest products companies will lose a substantial degree of access to the frequencies on which the industry's mobile

communications system [sic] predominately operate because the Petroleum and the Power coordinators have been given the authority to deny access to those frequencies to non-petroleum, non-utility entities."[29/] The new coordination rules do not give the CII coordinators *carte blanche* to deny a coordination or refuse to provide a requested concurrence at whim. Rather, these coordinators -- like all others -- must employ established methods of frequency coordination and, moreover, are required to furnish a written statement to any applicant that is denied a request to use frequencies over which these coordinators have sole coordination/concurrence authority.[30/] This written statement must set out the reasons for the denial of the coordination request "in sufficient detail to permit discernment of the technical basis for declining concurrence."[31/] Consequently, the new coordination rules strike a fair and appropriate balance between the interest of applicants in obtaining access to formerly shared frequencies and the need to provide some measure of protection to incumbent CII systems.

C. API's Recommended "Protected Service Contour" Approach May Be Employed Within the Framework of the Existing Rules

21. In its Petition, FIT argues that -- instead of the coordination protections adopted in the *Second MO&O* -- the Commission should adopt the "protected service

---

[29/] FIT Petition at 10.

[30/] See *Second MO&O* at ¶ 29.

[31/] *Id.*

contour" approach advocated by API in its Petition for Reconsideration of the *Second R&O*.[32/] Under this approach, MRFAC, FIT and other coordinators would be required to seek the concurrence of the appropriate CII coordinator whenever certain service contours of an applicant's proposed system would overlap certain service contours of an existing CII system.[33/]

22. API, UTC and AAR appreciate FIT's implicit recognition that vital CII operations on formerly shared channels were not adequately protected under the rules that were in effect prior to the adoption of the *Second MO&O* (and that remain in effect today as a result of the Stay Order). The CII coordinators believe, however, that the "protected service contour" approach may be used in conjunction with, rather than in lieu of, the coordination rules established in the *Second MO&O*. In other words, this approach should be viewed and sanctioned by the Commission as one reasonable type of concurrence arrangement that, *under the existing rules*, may be entered between a CII coordinator and MRFAC, FIT and/or other recognized coordinators for the Industrial/Business Pool.

23. Given that the coordination procedures adopted in the *Second MO&O* do not define or specify how the concurrence process should work, the Commission

---

[32/] FIT Petition at 11.

[33/] For the specific contours that would be employed, see API's Petition for Reconsideration of the *Second R&O* at 6 (filed May 19, 1997).

presumably intended to allow the CII coordinators some flexibility in determining what type of concurrence is most appropriate in any particular circumstance. The "protected service contour" approach is, in essence, a blanket concurrence on any application that does *not* impinge on the contour of an existing CII system. While it may be appropriate for the CII coordinators to provide such a blanket concurrence to coordinators whose customers typically are compatible with CII entities and that historically have sought to preserve the integrity of CII systems,[34/] API, UTC and AAR are hesitant at this time to entrust all coordinators to unilaterally perform the contour analysis in question. In light of the safety risks involved here and the types of coordination problems that have been occurring, it is preferable to permit the CII coordinators to determine for themselves the circumstances under which they are willing to cede their right under the *Second MO&O* to individually review and concur on *every* application for use of the formerly shared channels.

24. API, UTC and AAR also have some concerns regarding the "10 day notice" procedures proposed by FIT. (See FIT Petition at 11-12). To the extent that such procedures ultimately would enable FIT to file an application on which the applicable CII coordinator has refused to provide concurrence, they are inconsistent with the goal of ensuring protection from interference to CII systems. Coordinators should not be

---

[34/] Indeed, the CII coordinators would be willing to discuss such an arrangement with FIT and MRFAC.

permitted to employ mere "notice" (coupled with an opportunity to mutually resolve the matter) as an end run around the concurrence requirement.

III. CONCLUSION

25. The coordination rules adopted in the *Second MO&O* are entirely sound as a matter of administrative procedure and are absolutely essential to address legitimate public safety concerns that have been raised by the CII. These public safety concerns should not be shoved aside on the basis of the speculative financial considerations presented by MRFAC and FIT. Instead, the Commission should act as expeditiously as possible to lift the stay that presently is in effect and to reaffirm the validity of the portions of the *Second MO&O* that are at issue here.

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute, the United Telecom Council and the Association of American Railroads respectfully request the Commission to deny the Petitions for Partial Reconsideration

filed by MRFAC, Inc. and Forest Industries Telecommunications and to lift the Stay Order released in this proceeding on August 5, 1999.

Respectfully submitted,

AMERICAN PETROLEUM INSTITUTE

By: Wayne Y. Black

Wayne Y. Black
Nicole B. Donath
Keller and Heckman LLP
1001 G Street, N.W., Suite 500 West
Washington, D.C. 20001
(202) 434-4100
Its Attorneys

UNITED TELECOM COUNCIL

By: Jeffrey L. Sheldon /nbd

Jeffrey L. Sheldon
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036
(202) 872-0030

ASSOCIATION OF AMERICAN RAILROADS

By: Thomas J. Keller /nbd

Thomas J. Keller
John M. Kneuer
Verner, Liipfert, Bernhard, McPherson and Hand, Chtd.
901 15th Street, N.W., Suite 700
Washington, D.C. 20001
(202) 371-6060
Its Attorneys

Dated: September 30, 1999

CERTIFICATE OF SERVICE

I, Patt Meyer, a secretary in the law firm of Keller and Heckman LLP, hereby certify that on this 30th day of September, 1999, copies of the foregoing JOINT OPPOSITION OF API, UTC AND AAR TO PETITIONS FOR PARTIAL RECONSIDERATION FILED BY MRFAC, INC. AND FIT were served by first class mail, postage prepaid, on the parties listed below:

George Petrutsas, Esquire
Paul J. Feldman, Esquire
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209

Mr. Kenton E. Sturdevant
Executive Vice President
Forest Industries Telecommunications
Suite A
871 Country Club Road
Eugene, Oregon 97401

William K. Keane, Esquire
Elizabeth A. Hammond, Esquire
ARTER & HADDEN LLP
1801 K Street, N.W., Suite 400K
Washington, DC 20006

Patt Meyer